IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 30TH NOVEMBER 2006 / 9TH AGRAHAYANA 1928

WP(C).No. 13429 of 2006(W)

CMA.12/2005 of VI ADDL.DISTRICT COURT, ERNAKULAM &
I.A.2666/04 IN
OS.563/1998 of I ADDL.M.C.,ERNAKULAM

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PETITIONER:

SESIL JOSEPH, S/O. JOSEPH,
AGED 38 YEARS, KONDODY HOUSE, MANGALAM DAM P.O.,
ALATHUR, PALAKKAD, NOW RESIDING AT FLAT NO.21,
MARVEL MANSION, KATHRUKADAVU, KALOOR.

BY ADV. SRI.K.C.ELDHO

RESPONDENTS:

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1. P. SEKHAR, S/O. PRATAP RAO SAIP,
PARVATHI-MAHADEV, COVENT JUNCTION, KOCHI-35.

2. ALFRED PALLAN,
PALLATH HOUSE, BUILDING NO.30/1214-I,
POONITHURA P.O., ERNAKULAM DISTRICT.

BY ADV. SRI.K.C.CHARLES
SRI.A.BALAGOPALAN
SRI.A.RAJAGOPALAN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 30/11/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX:

EXT.P1: COPY OF IA 2665/04 DT.17.3.04 IN OS 563/98 OF I ADDL.MUNSIFF COURT, ERNAKULAM

EXT.P2: COPY OF IA 2666/04 DT.17.3.04 IN EXT.P1

EXT.P3: COPY OF COUNTER AFFIDAVIT FILED BY 1ST RESPONDENT TO EXT.P1

EXT.P4: COPY OF COUNTER AFFIDAVIT FILED BY 1ST RESPONDENT TO EXT.P2

EXT.P5: COPY OF COMMON ORDER DT.10.12.2004 IN EXT.P1 & P2

EXT.P6: COPY OF APPEAL MEMORANDUM DT.11.1.05 IN CMA 12/05 FILED BEFORE DISTRICT COURT, ERNAKULAM

EXT.P7: COPY OF APPEAL MEMORANDUM DT.11.1.05 IN CMA 13/05 FILED BEFORE DISTRICT COURT, ERNAKULAM

EXT.P8: COPY OF AFFIDAVIT DT.10.2.06 FILED BY PETITIONER IN CMA 13/05

EXT.P9: COPY OF PETITION TO ACCEPT AND TREAT EXT.P8 AFFIDAVIT AS PART OF APPEAL MEMORANDUM VIDE IA 435/06 IN CMA 13/05 OF DISTRICT COURT, ERNAKULAM

EXT.P10: COPY OF COMMON JUDGMENT DT.24.2.06 IN CMA 12/05 AND 13/06 OF VIth ADDL.DISTRICT COURT, ERNAKULAM

EXT.P11: COPY OF JUDGMENT DT.7.4.05 IN WPC 11997/05 OF HIGH COURT OF KERALA

EXT.P12: COPY OF MEMO DT.17.5.05 FILED BY COUNSEL FOR PETITIONER BEFORE THE I ADDL.MUNSIFF COURT, ERNAKULAM IN EP 109/02 IN OS 563/98

//True copy//

SHW TO JUDGE.

M.SASIDHARAN NAMBIAR,J.

W.P.(C) .NO. 13429 OF 2006

Dated 30th November 2006

JUDGMENT

Petitioner is second defendant in O.S.563/1998 on the file of Munsiff court, Ernakulam. First respondent is the plaintiff and second respondent the first defendant in the suit. Suit was filed seeking a .decree for arrears of rent and electricity charges. Suit was originally dismissed for default. It was restored on 16/6/2000. Subsequently a decree was passed on 16/6/2001. Petitioner filed I.As.2665/04 and 2666/04, applications under Section 5 of Limitation Act to condone the delay and application under Order IX Rule 13 to set aside ex-parte decree. Delay was of 980 days. Case of petitioner was that he was not aware of the application for restoration of suit and suit was dismissed for default earlier and he came to know about decree only when O.S.273/01 filed by first respondent against petitioner and second respondent was included in the special list and immediately

applications were filed to condone the delay and to get the ex-parte decree set aside First respondent opposed the applications contending that petitioner was served with notice in the restoration application after his counsel refused to receive notice stating that party had taken the case bundle and pendency of O.S.563/1998 was specifically pleaded in the written statement filed by petitioner in O.S.273/01 and existence of the decree granted in O.S.563/98 was stated by petitioner himself in his written statement and therefore there is no ground to set aside the ex-parte decree or to condone the delay. Trial court dismissed both applications. Petitioner challenged the order of dismissal of the applications before District court, Ernakulam in C.M.A.Nos.12/05 and 13/05. Under Ext.P10 common order, District Judge dismissed both the applications holding that there is no sufficient cause to condone the delay or to set aside the ex-parte decree. It is being challenged in this petition filed under Article 227 of Constitution of India.

2. Learned counsel appearing for petitioner

and first respondent were heard. Arguments of learned counsel appearing for petitioner was that courts below did not properly appreciate the facts and the suit was originally dismissed for default and factum of its restoration was not known to petitioner and it came to the knowledge of petitioner only when O.S.273/01 was included in the special list and immediately applications were filed and there is no reason to disbelieve that case and hence orders of the trial court and appellate court are to be quashed. Learned counsel appearing for first respondent pointed out that even in the written statement filed on 11/2/2003 in O.S.273/01 petitioner specifically admitted that O.S.563/98 filed by first respondent was decreed and in such circumstances there is no reason for the delay at least from 11/2/2003. Courts below on perusal of the records found that notice in the restoration application was served on the petitioner personally and therefore there is no reason to interfere with the orders. Arguments of learned counsel appearing for petitioner was that recitals in the written statement about

decree in O.S.563/98 is a typographical error and should not have been relied on by the courts below.

3. Facts as disclosed in Ext.P10 order establish that before the suit was restored to file, in the application filed by first respondent to restore the suit notice was served personally on the petitioner. That notice was sent directly as the counsel submitted that petitioner had taken back the case records. Though learned counsel appearing for petitioner now submitted that it was not personally served, in the light of factual finding in Ext.P10, in exercise of the extra ordinary jurisdiction it is not possible to re-appreciate the evidence and enter a different finding of fact in revision. It is therefore proved that notice was served on petitioner before suit was restored to file. In such circumstance petitioner cannot contend that he was not aware of the decree or the fact that suit was restored to file. More over, fact that existence of the decree granted in O.S.563/98 was pleaded by petitioner himself in his written statement filed on 11/2/2003 make it perfectly clear that petitioner was

aware of the decree at least on 11/2/2003. If that be so, there is absolutely no explanation for the non filing of applications from 11/2/2003, till the applications were filed in 2004. In such circumstance, I find no reason to interfere with Ext.P10 order passed by District court confirming the order of the trial court.

Writ petition is dismissed.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.